

Sovereign Bank, FSB v Holmes
2007 NY Slip Op 32439(U)
August 6, 2007
Supreme Court, Rensselaer County
Docket Number: 0217408/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF RENSSELAER

SOVEREIGN BANK, FSB,

Plaintiff,

-against-

ABBIE HOLMES, PATRICK A. WILLIAMSON, SR.,
ADRON BUTLER, BELESKA PLANNING, LTD.,
NIAGARA MOHAWK POWER CORPORATION,
SUZIE HOLMES,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 41-0270-06 Index No. 217408

Appearances: Berkman, Henoch, Peterson & Peddy, P.C.
Attorneys For Plaintiff
100 Garden City Plaza
Garden City, New York 11530

Patrick A. Williamson, Sr.
Defendant, Pro Se
11 Manor Blvd.
Troy, NY 12180

DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiff in the above-captioned mortgage foreclosure action has applied for a judgment of foreclosure and sale. As a part of the application plaintiff indicates that all of the defendants defaulted in responding to the summons and complaint.

Defendant Patrick A. Williamson, Sr. (“defendant”) was served with a copy of the summons and complaint pursuant to CPLR 308 (2) by service upon a person of suitable age and discretion. The affidavit was filed in the office of the Rensselaer County Clerk on March 24, 2006. Under CPLR 308 (2) and CPLR 320, defendant’s time to answer or appear expired on May 3, 2006. According to the defendant’s affidavit in opposition, he served a verified response to the complaint in late June of 2006. On July 14, 2006 the plaintiff served a “notice of rejection” in which plaintiff returned defendant’s papers on grounds that they were untimely served. The notice of rejection included the following paragraph:

“Berkman, Hensch, Peterson & Peddy will however as a courtesy serve Abbie Holmes-Williamson Pro Se and Patrick A. Williamson, Pro Se copies of all motions and supporting documents in the foreclosure going forward.”

The foregoing is significant because it appears that the defendant was never noticed on the application for appointment of a referee to compute; and was never provided notice of a hearing by the referee.

Defendant’s papers also reveal something else. Defendant contends that plaintiff improperly applied payments that he had sent to the plaintiff. Defendant also contends that the attorneys fees and disbursements demanded by the plaintiff are unreasonable¹.

¹As plaintiff points out, paragraph 19 of the mortgage recites that the defendant has the right to a discontinuance of enforcement of the mortgage where “(c) I pay all of Lender’s reasonable expenses in enforcing this Security Instrument including, for example, reasonable attorneys’ fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender’s interest in the Property and rights under this Security Instrument* * *.” In addition, Paragraph 22 of the mortgage recites in sum and substance that plaintiff has the right to collect reasonable attorneys fees in the event plaintiff commences a lawsuit for foreclosure and

According to the defendant, on March 3, 2006, just prior to commencement of the action², one Paul Newman, a representative of the plaintiff, forwarded a letter to the defendant indicating that the sum of \$7,717.13 was required to reinstate the mortgage, “plus any additional attorney fees and costs”. On April 3, 2006, Mr. Newman acknowledged receipt of checks totaling \$7,725.00 from the defendant, but indicated that the sum of \$2,365.25 in attorneys fees was due and owing, together with the payment due April 1, 2006 in the sum of \$1,508.96. On August 5, 2006 the defendant forwarded to the plaintiff a check in the sum of \$15,398.05. It appears that the defendant refused to pay plaintiff’s attorneys fees and disbursements. Defendant maintains that plaintiff misrepresented the facts when, on the application for an order of reference, plaintiff’s representative Constance M. Cocroft stated that no payments had been made by any of the defendants since commencement of the action. In addition to all of the foregoing, defendant has submitted a letter dated April 18, 2007 from the plaintiff addressed to the defendant Abbie Holmes which enclosed a refund check in the sum of \$26,630.27 representing “payments received over the course of time, which, was not sufficient to fully reinstate your account”.

A number of matters are rather troubling. The affidavit of regularity submitted in connection with the application for appointment of a referee never mentioned that the defendant submitted an untimely answer that had been rejected. It was affirmatively

sale.

²The summons and complaint were filed in the office of the Rensselaer County Clerk on March 20, 2006.

indicated in the same application that no party was entitled to notice thereof, which was not correct, in view of the language contained in the notice of rejection. Defendant was also not provided notice of a hearing with respect to the referee's computation of the amount due and owing under the note and mortgage. Lastly, the affidavit of Constance M. Cocroft, sworn to June 6, 2006 (relied upon by the court-appointed referee in making his computation), affirmatively indicated that no payments were made by any of the defendants since the action was commenced. This does not appear to be correct.

The Court recognizes that the defendant may be in default in appearing in the action. In addition, to date, he has not made a motion pursuant to CPLR 3012 (d) to compel acceptance of his answer. Nonetheless, defendant could properly rely upon the language contained in the notice of rejection, which indicated that he would receive notice of all future applications. This was not done.

Under the circumstances, the Court finds that the motion for a judgment of foreclosure and sale should be denied. In addition, because the defendant did not receive the notice to which he was entitled, the Court finds that the order dated March 22, 2007 appointing a referee to compute must be vacated.

Accordingly, it is


ORDERED, that the motion for a judgment of foreclosure and sale is denied; and it is further

ORDERED, that the order dated March 22, 2007 appointing a referee to compute is

vacated, subject to plaintiff's right to re-apply upon proper papers at any time, on notice to the defendant.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the plaintiff, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: August 6, 2007
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated April 20, 2007, Supporting Papers and Exhibits
2. Notice of Motion, Verified Response & Counter Motion dated April 30, 2007
3. Affirmation of Henry P. Distefano, Esq., dated May 16, 2007